CITY OF SAN ANTONIO, TEXAS

IBLA 82-94 Decided July 15, 1982

Appeal from the decision of the New Mexico State Office, Bureau of Land Management, denying protest against the inclusion of tract G-329 in proposed competitive lignite lease sale NM-A 29460 TX.

Reversed and remanded.

1. Coal Leases and Permits: Generally -- Coal Leases and Permits: Leases -- Mineral Leasing Act for Acquired Lands: Lands Subject to

   Where title to lignite in a certain tract of land is disputed, and a Bureau of Land Management determination that the United States owns the lignite by virtue of its ownership of the surface is not supported by the record, the Bureau of Land Management's decision to include the tract in a competitive lignite lease sale is improper and must be reversed.

APPEARANCES: W. Roger Wilson, Esq., San Antonio, Texas, for appellant; John H. Harrington, Esq., Office of the Field Solicitor, Department of the Interior, Santa Fe, New Mexico, for Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

By letter dated October 14, 1981, the City Public Service Board of the City of San Antonio, Texas (San Antonio), filed a protest with the New Mexico State Office, Bureau of Land Management (BLM), against the inclusion of tract G-329 in proposed competitive lignite lease sale NM-A 29460 TX. The lease sale was to cover lignite deposits within Camp Swift in Bastrop County, Texas, and tract G-329 includes approximately 120 acres of the proposed 6,445-acre lease. San Antonio claimed title to all coal and lignite in, under, or on the surface of tract G-329 by virtue of a coal deed executed to the City dated December 27, 1979, and it objected to any disposition of its ownership rights, requesting that the tract be withdrawn from the sale. The City also requested that its claimed ownership rights in the tract be recognized by BLM through a disclaimer of interest issued pursuant to 43 U.S.C. § 1745 (1976).

By decision dated October 27, 1981, BLM dismissed San Antonio's protest. BLM ruled that the United States owns the lignite reserves in tract G-329 on the basis of a title opinion rendered by the Field Solicitor, Department of the Interior, dated August 7, 1980, and supplemented April 10, 1981. The title opinion concluded that the outstanding mineral interest underlying tract G-329 did not include lignite and that the United States is vested with title to the lignite by virtue of its ownership of the surface, citing Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971) and Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977). Thus, BLM concluded that inclusion of tract G-329 in the lease sale was proper. 1/ San Antonio appealed.

The United States acquired the surface estate of tract G-329 from Fannie Thomas in 1942. The conveyance was expressly made subject to the mineral rights outstanding of record in favor of third parties resulting from a mineral deed executed on December 17, 1921, by Fannie Thomas and her husband, George Thomas. The Government's documents related to the acquisition of tract G-329 indicate that the United States understood that it had acquired only the surface and that all minerals were outstanding.

The 1921 mineral deed states that the Thomases:

> Granted, Sold and Conveyed, * * * unto the said Joe Flory, A. L. Moon, H. M. Handshy and J. T. Hall of Bexar County, Texas, all of the Coal, Oil, Gas, and other minerals of whatsoever kind, character or description, lying, being and situated under and beneath the surface of all of [tract G-329]. To Have and To Hold unto the said Joe Flory, A. L. Moon, H. M. Handshy and J. T. Hall each an equal one-fourth interest in all of the Coal, Oil, Gas, and other minerals of whatsoever kind, character and description under and beneath the surface of the above described premises, together with the right of ingress and egress to and for the said Joe Flory, A. L. Moon, H. M. Handshy, and J. T. Hall, or either of them, and their heirs and assigns to enter upon said land and premises for the purpose of developing the mineral resources under and beneath said land and to the use of so much of the surface of said land and premises as may be necessary to dig shafts and erect mining equipment and to lay railroad tracks and road ways as may be necessary to the successful mining of all minerals of whatsoever kind that may be under and beneath said land and premises, to have and to hold said rights and privileges and all of the mineral of whatsoever kind, character and description under and beneath said land unto the said Joe Flory, A. L. Moon, H. M. Handshy and J. T. Hall their heirs and assigns forever, and we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend, all and singular, the said mineral rights and privileges unto the said Joe Flory, A. L. Moon, H. M. Handshy, and J. T. Hall their heirs and assigns against every person whomsoever lawfully

1/ In its decision, BLM also gave notice that it intended to proceed with the lease sale scheduled for Nov. 10, 1981, because of the expense of rescheduling it. BLM stated, however, that it would notify all bidders of the protest and not issue the lease until this Board had reviewed any appeal.

> claiming, or to claim the same or any part thereof. It is expressly agreed and understood that the grantors reserve the surface of said land and premises and the occupancy, thereof to and for their own use and benefit. [Emphasis added.]

On March 22, 1923, the Thomases' grantees, Flory, Moon, Hall, and Handshy, conveyed to Consumers Coal Company "all of the coal, of whatsoever kind, character or description, lying, being and situated under and beneath the surface" of tract G-329. Title to the coal next passed by a sheriff's deed dated April 7, 1925, which granted to Joe Obriotti "all of the coal of whatsoever kind, character and description, lying and being situated in, under and on the surface" of tract G-329 as owned by Consumers Coal Company. San Antonio's coal deed, dated December 27, 1979, from the heirs of joe Obriotti contains the same language of conveyance as the sheriff's deed. Thus, San Antonio's claim to all of the coal, including lignite, in tract G-329 is based on a chain of title going back to the Thomas mineral deed.

The Field Solicitor's August 7, 1980, title opinion ruled that

> [i]n Texas, a conveyance or reservation of the mineral estate, unless otherwise expressly stated, does not include those minerals lying at or so near the surface that they can be extracted only by stripping or pit mining. Acker v. Guinn, 464 S.W.2d 348 (Tex. 1971). This rule has been applied to deposits of lignite. Reed v. Wylie, 554 S.W.2d 169 (Tex. 1977). The rationale behind the rule is that an implied inclusion of surface deposits in a mineral conveyance or reservation would result in a destruction of the surface estate - contrary to the intention of the grantor. * * *
> * * * * *
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> Tract G-329 was subsequently purchased by the United States in 1942 from the owners of the surface estate. The title opinion concluded that valid title had vested in the United States, subject to "mineral rights, if any, outstanding of record in favor of third parties . . ."
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> These mineral rights include "all Coal, Oil, Gas, and other minerals of whatsoever kind, character or description, lying, being and situate under and beneath the surface . . ." Also conveyed was the right to enter upon the premises and use so much of the surface necessary to dig shafts and conduct other mining-related activities. The grantors, however, specifically and expressly reserved the surface for their own use and benefit. In accordance with the rule expressed in Acker v. Guinn and Reed v. Wylie, supra., and since the surface was expressly retained by the grantor, this deed did not convey the lignite deposits, now considered for leasing.

The supplemental opinion restated this finding.

In its statement of reasons, appellant argues that Acker v. Guinn, supra, and Reed v. Wylie, supra, do not apply to the Thomas mineral deed

because they were concerned only with whether the parties to a deed intended to include a particular mineral within the scope of a reservation or conveyance of "all minerals." Appellant argues that, unlike the language in the deeds in those cases, coal was specifically named in the Thomases' conveyance and thus that there is no question as to the intention of parties in this case. Appellant contends that both parties recognize that lignite is merely one form of coal, and that it is clearly encompassed by the phrase "all of the coal," noting that both BLM, with reference to its proposed lease, and the Texas Supreme Court, in the cited cases, use the terms interchangeably.

Appellant also points out that Reed v. Wylie, supra, was modified by the Texas Supreme Court in a second opinion, Reed v. Wylie, 597 S.W.2d 743 (Tex. 1980). Appellant argues that one holding reaffirmed in the court's second opinion particularly confirms the inapplicability of the Acker tests to the Thomas mineral deed. The court stated "if the surface owner * * * establishes ownership of the substance at or near the surface, he or she owns the lignite, iron, or coal beneath such land at whatever depth it may be found." 597 S.W.2d at 748. Appellant contends that while, under Reed, a grant or reservation of "all minerals" would not include any coal at any depth if the surface owner established that the coal was near the surface so that production by strip mining would destroy the surface, such a rule cannot be applied where coal is expressly granted or reserved because it would totally negate the grant or reservation. Appellant also suggests that this rule, when viewed in conjunction with the court's recognition that lignite can also be mined by underground methods, supports a finding that the court was unwilling to divide a coal estate between the mineral and surface owners. Finally, appellant urges that even surface mining is compatible with its grant of "all coal," though the language of its grant focused on underground mining techniques, because, under Texas law, the mineral estate is the dominant estate; the holders of such subsurface rights have significant leeway in using the surface to effect mineral extraction; and, finally, grants in deeds are construed liberally and against the grantor. Appellant contends that the breadth of surface impairment expressly contemplated by the Thomas deed would likely be no less than that caused by surface mining, in light of available reclamation methods. Thus, appellant concludes that each of these factors is in its favor as holder of the granted mineral estate.

In response, counsel for BLM has entered a motion to dismiss on the grounds that this Board is not the proper forum for determining the title to minerals in acquired lands. As an alternative to dismissal, counsel urges that we summarily affirm the BLM decision as a proper exercise of the Secretary's discretion, without reaching a decision on the title question. In support of his contentions, counsel argues that the Secretary of the Interior possesses unquestioned authority to determine what lands are under his supervision. He analogizes this appeal to cases where BLM rejects oil and gas lease applications because of an uncertainty over ownership of the mineral. Counsel concludes that since appellant "was not able to resolve all title questions in its favor, [BLM's decision], based upon title opinions rendered by the Solicitor's Office, should stand as a proper exercise of the Secretary's discretion and authority." Finally, counsel argues that if the Board determines to address the title question, it should nevertheless rule that the United States holds title to the "surface occurring lignite in Tract G-329." Counsel admits that the term "coal" includes lignite but argues that,

under the rule of Acker v. Guinn, supra, the deed cannot be construed to include conveyance of coal or lignite that can be mined only by strip or pit operations.

We fully agree with counsel for BLM that the Board -- indeed, the Department of the Interior -- cannot finally adjudicate the question of the Government's ownership of the mineral rights in relation to San Antonio's claim to the minerals. We do not find this limitation to be grounds for dismissal of appellant's case, however. As counsel so clearly recognizes, the Secretary does have authority to determine what lands are subject to his management, absent any contrary judicial determination. By delegation of authority from the Secretary, the Board of Land Appeals is authorized to hear, consider, and determine "as fully and finally as might the Secretary" matters involving appeals from decisions of Departmental officials relating to, among other things, the use and disposition of the mineral resources in acquired lands of the United States. 43 CFR 4.1.

In analogizing to cases where oil and gas lease applications are rejected if title to the minerals sought is uncertain, counsel for BLM states:

> In such situations the lease applicant usually is afforded an opportunity to provide the Bureau with a title abstract or memorandum to resolve the title questions. If the title questions are resolved in favor of the United States' mineral ownership, it appears that refusal to issue the lease is an abuse of discretion. On the other hand, if the applicant's submission does not resolve the title uncertainties, rejection of the application is a proper exercise of the Secretary's discretion.

Government's Supplemental Response at 3.

The principle generally espoused by the Board in oil and gas leasing situations is that "[u]ncertainty regarding the status of ownership of mineral deposits is sufficient grounds for the rejection of a lease offer in the exercise of the Secretary's discretionary authority over leasing." Edward C. Shepardson, 53 IBLA 79, 86 (1981); Don Jumper, 24 IBLA 218, 219 (1976). Counsel for BLM concludes that, in the case of an oil and gas lease offer, if the Department does not believe it owns the minerals, and the offeror does not argue convincingly that the Department does, it should not lease them because of the uncertainty of title. By analogy, counsel argues in the present case that since the Department believes it does own the lignite, and San Antonio has not proved otherwise, then it may lease the mineral rights in spite of the challenge to title. We believe that counsel's analogy might equally suggest that no leasing should occur in any case where title is uncertain by virtue of a legitimate dispute.

[1] The real question in this case is whether the exercise of the Secretary's discretion -- the decision to include tract G-329 in the coal lease sale -- was rationally based. Although title to the lignite may ultimately have to be settled in a court of law, the issue of whether BLM properly construed its authority over the lignite in tract G-329 is fundamental to whether inclusion of the tract in the lease sale was proper. Just as BLM may make such a determination, appellant may clearly challenge its propriety, and this

Board may hear the dispute and rule finally for the Department on whether the determination that it owns the lignite for the purposes of the coal lease is rationally based. Thus, we turn to the question of title.

The issue is whether all lignite (including that near the surface) was encompassed by the Thomases' grant of "all coal * * * lying, being and situated under and beneath the surface," so that it belongs to San Antonio; or whether the Federal Government owns the lignite occuring at or near the surface by virtue of its title to the surface rights of the Thomases, as originally defined by the Thomases' reservation of "the surface of said land and premises and the occupancy, thereof to and for their own use and benefit."

Under Texas law, the cardinal rule in construing an agreement is to ascertain the intention of the parties as expressed in the instrument. An agreement must be construed in its entirety, and each part of the agreement must be considered with every other part in order to determine the effect of one part on another. A written instrument is not ambiguous if it is so clearly worded that a court may give it a certain legal meaning or interpretation. An instrument is ambiguous if after applying the established rules of interpretation to the agreement, it remains reasonably susceptible of more than one meaning. See N. M. Uranium, Inc. v. Moser, 587 S.W.2d 809, 814 (Tex. Civ. App. 1979) and cases cited therein. Accord, Woods v. Sims, 273 S.W.2d 617, 620-21 (Tex. 1954).

Lignite, by definition, is a form of coal. It is described as:

> A brownish-black coal in which the alteration of vegetal material has proceeded further than in peat but not so far as subbituminous coal. * * * Coal of low rank with a high inherent moisture and volatile matter; in this general sense, lignite may be subdivided into black lignite, brown lignite and brown coal. * * * In the English-speaking countries, the terms lignite and brown coal are used synonymously, although some authors confine the term lignite to low-rank brown coal consisting largely of easily recognized wood.

Bureau of Mines, Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms, 641 (1968). We find, therefore, that a reference to "all of the coal" must by definition embody lignite as well as any other material that can be classified as coal. However, we must now address BLM's argument that the lignite in this case is part of the surface estate 2/ and not part of the mineral estate granted by the Thomas deed.

2/ There is no clear evidence in the record as to the depth of the lignite in question. BLM's Environmental Impact Statement indicates in part:

"The lignite underlying the Camp Swift Military Reservation occurs in the Calvert Bluff Formation of the Lower Eocene Wilcox Group. In Bastrop County, the Calvert Bluff Formation reaches a maximum thickness of about 305 meters (1000 feet) (Barnes 1974). The most important commercial lignite beds occur in the lower third of the formation. Five distinct lignite-bearing strata are present throughout the region. On the proposed lease area, three of the five strata contain an estimated 70 to 90 million metric tons (80 to

First, we will further examine the language of the Thomas deed. The coal conveyed is that "lying, being and situated under and beneath the surface" of the land. The common dictionary meanings of the words "under" and "beneath" are as follows: "Under" means "lower than and overhung by;" "having directly overhead;" and "beneath" means "at or to a level lower than," "immediately under." Webster's Third New International Dictionary, at 203, 2487 (1966). The word "surface" in the context of mining and mineral/surface estate division means:

> The top of the ground; the soil, clay, etc., on the top of strata. As used in the conveyance of coal in place, or in a conveyance of land reserving the minerals, includes not merely the surface within the boundary lines, without thickness, but includes whatever earth, soil, or land lies above and superincumbent upon the coal or mineral reserved. Fay. b. In mining controversies, that part of the earth or geologic section lying over the minerals in question, unless otherwise defined by the deed or conveyance. [Emphasis added.]

A Dictionary of Mining, Mineral, and Related Terms, 1105. Accord, Fleming Foundation v. Texaco, Inc., 337 S.W.2d 846, 850 (1960); 58 C.J.S., Mines and Minerals, § 3(g) (1948). On the basis of this definition, it appears that the Thomases intended to convey all of the coal, including the lignite, existing both below and near the surface of the land.

We agree with appellant that the cases cited by the Field Solicitor are not determinative. In both the Acker and Reed opinions, the Texas Supreme Court was fashioning rules for construing whether a specific mineral, not otherwise addressed in a deed, was included in a grant or reservation of "all minerals." The court was concerned only with ascertaining the general intent of the parties in absence of any expression of specific intent. Thus, in Acker the court held that "unless the contrary intention is affirmatively and fairly expressed, * * * a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate." 464 S.W.2d at 352. (Emphasis added.) However, in applying the Acker opinion, the court stated in Reed v. Wylie, 554 S.W.2d at 172:

> If the instrument had specifically reserved coal and lignite, or if the conveyance had expressly reserved all minerals lying upon the surface or at any depth and including those minerals which may be produced by open pit or strip mining, the intention and effect of the instrument would have been clearly expressed. * * * Because it is not expected that the parties to the instrument

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fn. 2 (continued)
100 million short tons) of lignite recoverable by surface mining methods. The thickness of individual, recoverable, lignite-bearing strata varies from 1.1 to 3.6 meters (3.5 to 11.8 feet). The other two lignite-bearing strata are too thin to be economically recoverable."
Final Environmental Impact Statement for Proposed Camp Swift Lignite Leasing, Vol. 1, p. 2-1.

would have intended the destruction of the surface by the mineral owner in the absence of an expression of that intention, their use of "mineral" in the instrument is not construed to include the near surface substance. Once the instrument is construed to that effect, this particular substance -- at whatever depth -- is not a "mineral" for all purposes of the instrument.

> Acker v. Guinn stands for the rule that a [i.e., an unspecified] substance is not a "mineral" if substantial quantities of that substance lie so near the surface that the production will entail the stripping away and substantial destruction of the surface. That being the circumstance, and there being no contrary affirmative expression in the instrument, it controls the construction of the instrument as to the same substance at all depths. [Emphasis supplied.]

The principles expressed in the Acker and Reed opinions are rules of construction that could be used to determine whether a particular mineral were included in the Thomases' grant of "other minerals of whatsoever kind, character, or description;" they do not apply (except, perhaps, conversely) to the lignite at issue because, as a form of coal, it was encompassed in the express conveyance of all coal by the deed. See Weed v. Brazos Electric Power Co-op, Inc., 574 S.W.2d 570, 575-76 (Tex. Civ. App. 1978).

Furthermore, the Court intended that these principles apply only to a determination of ownership of the minerals; they do not resolve the questions of the extent to which the mineral may be mined and by what method it may be mined. 3/ The answers to these questions must turn on a construction of the limitations on mineral ownership represented by the surface reservation and on the intent of the language governing mining activity in the Thomas deed. The Thomases' reservation of the surface of the tract for their own use and benefit may limit the extent to which the grantee is entitled to remove the coal underlying the tract, under the principles of mineral deed construction which prevent destruction of the surface or require support of the surface. On the other hand, as appellant argues in its statement of reasons, surface mining may be fully compatible with its grant under current Texas law. The measurement of the extent to which a mineral owner may use the surface must be adjudicated on a case-by-case basis after ownership is determined. We make no finding on this issue. For a general discussion by the Board of the relative rights of the owner of the mineral estate vis-a-vis the owner of the surface estate, see Santa Fe Pacific Railroad Co., 64 IBLA 27, 29-31 (1982).

We conclude that the Regional Solicitor's title opinion does not provide a sufficient basis for a decision to include the lignite in tract G-329 in the Camp Swift coal lease sale and, therefore that it would be improper for BLM to lease tract G-329.

3/ As stated by the court in the first Reed opinion, "We are not dividing the right to produce the substance, we are construing the instrument of conveyance to ascertain the ownership of the substance." 544 S.W.2d at 172. See Riddlesperger v. Creslenn Ranch Co., 595 S.W.2d 193, 197 (Tex. Civ. App. 1980).

With reference to San Antonio's request that this Board order the issuance of a disclaimer of interest in the lignite pursuant to 43 U.S.C. § 1745 (1976), we note that no application for such has been filed or acted upon by BLM. The jurisdiction of the Board is exclusively appellate, and although such an order might reasonably be construed as affording appropriate relief in the disposition of an appeal such as this, the Board prefers not to make initial decisions on application which properly would be addressed to BLM in the first instance. In this case it does not appear necessary to our resolution of the matter to so order. Moreover, this Board has held that BLM should suspend adjudication of applications for disclaimers of interest until regulations have been promulgated implementing the statutory provision, or until authorized by a policy directive. Dennis Potts, 42 IBLA 355 (1979); Grace Cooley Coleman, 35 IBLA 236 (1978). San Antonio may file its application for the disclaimer with BLM's New Mexico State Office, with the understanding that BLM's action thereon may have to be deferred. Of course, a decision by BLM adverse to the applicant would be subject to appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is reversed, and the case is remanded for further action consistent herewith.

Bernard V. Parrette
Chief Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge